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## Pinocchio for the Defense

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## COMMENTS

### PINOCCHIO FOR THE DEFENSE

LINDA HARRISON GOTTLIEB

*Listen, you country bumpkins, you swag-bellied yahoos, we know how to tell many lies that pass for truth, and we know, when we wish, to tell the truth itself.<sup>1</sup>*

**T**HE PERJURIOUS client is a chronic problem for defense counsel who must ethically and effectively discharge responsibilities owed to a client, colleagues, the public, the court, and not least, to self.<sup>2</sup> The Florida Bar *Code of Professional Responsibility* suggests that the duties owed to the legal system and to the client are identical: to represent the client "zealously within the bounds of the law."<sup>3</sup> However, an "irreconcilable conflict" frequently occurs when zealous representation leads to the proffer of false testimony.<sup>4</sup> The professional standards and rules obscure rather than illuminate the paths available to an attorney confronted with a lying client.<sup>5</sup> Authors in scholarly and professional journals lament

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1. HESIODUS, *THE THEOGONY* line 27 (A. Athanassakis trans. 1983).

2. T. MORGAN & R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 4 (1976).

3. FLA. BAR CODE PROF. RESP. EC 7-19.

4. *Sanborn v. State*, 474 So. 2d 309, 314 (Fla. 3d DCA 1985).

5. The standards usually invoked when an attorney is faced with client perjury include the American Bar Association's (ABA) *Model Rules of Professional Conduct*, *Standards for Criminal Justice*, and *Model Code of Professional Responsibility*.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1983) provides that a lawyer shall not "[k]nowingly use perjured testimony or false evidence." DR 7-102(A)(7) prohibits counseling or assisting a client "in conduct that the lawyer knows to be illegal or fraudulent." These rules would appear to be clear and straightforward except for *id.* EC 7-26 (1983) (emphasis added), which extends a lawyer's obligation to refrain from using perjured testimony or false evidence to include those circumstances where the attorney "knows, or from facts within his knowledge, *should know*, that such testimony or evidence is false, fraudulent, or perjured."

On the other hand, DR 4-101 states the general prohibition against a lawyer revealing the confidences and secrets of his client, which arguably could include a client's confiding his intent to lie on the witness stand. However, the prohibition is qualified in DR 4-101(C), which provides that "[a] lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." Because perjury is a crime it would seem to come within the qualification of this subsection. Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations*

this obscurity and suggest solutions that do not fully respond to the various competing interests.<sup>6</sup> State and federal courts also vary in their approaches to this dilemma.

The United States Supreme Court recently set out elaborate dicta regarding the ethical conduct of an attorney faced with a perjurious client.<sup>7</sup> Justice Brennan, in his concurrence, cautioned that "the Court *cannot* tell the states or the lawyers in the states how to behave in their courts, unless and until federal rights are violated."<sup>8</sup> Yet when federal rights are at issue, the Court avoids evaluation of the attorney's conduct, preferring to examine the

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to the Court and to His Client, 59 DEN. L.J. 75, 80 (1981). The Code does not mandate that a lawyer reveal a client's intent to commit perjury, but only provides that a lawyer may so reveal. *Id.*

To deepen the confusion, DR 7-102(B)(1) provides that:

A lawyer who receives information clearly establishing that: [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

The Code does not clearly define which communications might be privileged, although DR 4-101(C)(2) allows a lawyer, whenever "permitted" under the Disciplinary Rules, to reveal confidences or secrets.

Some confidences and secrets must be unprotected by the attorney-client privilege, or else DR 4-101(C)(2) is mere surplusage. But the ABA Committee on Ethics and Professional Responsibility has offered a tautological definition of the secrets and confidences that fall outside the ambit of the "privileged communication" clause: "The balancing of the lawyer's duty to preserve confidences and to reveal frauds is best made by interpreting the phrase 'privileged communication'. . . as referring to those confidences and secrets that are required to be preserved by DR 4-101." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

6. The problem of the perjurious client has attracted a small army of commentaries. See generally Erickson, *supra* note 5; Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665 (1978); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121 (1985); Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067 (1975); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977); Comment, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 CREIGHTON L. REV. 487 (1983); Comment, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545 (1978); Comment, *Perjured Alibi Testimony: The Defense Attorney's Conflicting Duties*, 48 MO. L. REV. 257 (1983); Comment, *Responding to the Criminal Defense Client Who Insists on the Presentation of Perjuring Nonparty Witnesses: The Schultheis Solution*, 68 IOWA L. REV. 359 (1983); Rotunda, Book Review, 89 HARV. L. REV. 622 (1975).

7. *Nix v. Whiteside*, 106 S. Ct. 988 (1986).

8. *Id.* at 1000 (Brennan, J., concurring) (emphasis in original).

prejudice alleged due to counsel's behavior.<sup>9</sup> Ultimately, each state is left to its own devices.

Florida has chosen to address the problem of the lying client through free narrative testimony.<sup>10</sup> The defendant takes the stand and, under oath, tells his story to the court without interruption or examination by defense counsel. In choosing this approach, Florida has done a disservice to attorneys, judges, and jurors who participate in the judicial process and to the citizens of Florida who rely on the outcome. In this Comment, the author details the history of the free narrative approach and identifies its weaknesses through an analysis of *Sanborn v. State*.<sup>11</sup> Analysis of additional case law demonstrates the confusion the free narrative approach has caused in other jurisdictions as well as in the federal courts. Finally, the author suggests an alternative approach that places a higher value on the truth-finding aspect of the judicial process.

### I. DEFENSE FUNCTION STANDARD 4-7.7

The American Bar Association (ABA) has for some years drafted and published a series of reports that set forth standards by which criminal justice may be better administered.<sup>12</sup> At one time, the ABA Standing Committee on Association Standards for Criminal Justice proposed Standard 4-7.7 as part of a chapter addressing the defense function. The Standard offered guidance to defense counsel in dealing with client perjury in a criminal case.

Under the Standard, defense counsel was first to try to dissuade the accused from taking the witness stand if he planned to offer perjurious testimony.<sup>13</sup> If the accused were not dissuaded, counsel could seek to withdraw prior to trial but he could not advise the court of the reason for his request.<sup>14</sup> If the court did not allow

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9. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). The defendant must show that counsel's errors were so grave that defendant was deprived of a fair trial. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

10. See *Rubin v. State*, 490 So. 2d 1001 (Fla. 3d DCA 1986), *cert. denied*, No. 69,048 (Fla. filed Dec. 19, 1986); *Sanborn v. State*, 474 So. 2d 309 (Fla. 3d DCA 1985).

11. 474 So. 2d 309 (Fla. 3d DCA 1985).

12. 1 STANDARDS FOR CRIMINAL JUSTICE (1986) [hereinafter cited as STANDARDS].

13. "If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true but the defendant insists on the right to trial, counsel must strongly discourage the defendant against taking the witness stand to testify perjurally." *Id.* Standard 4-7.7(a).

14. Subsection (b) of the Standard provides:

counsel to withdraw, and the accused took the stand and perjured himself, counsel was not to assist in or use the perjured testimony. Counsel was to refrain from direct examination and allow the accused to give an unassisted narrative account. Counsel was then to ignore the accused's narrative for the remainder of the trial and not use any aspect of the false version of facts in his closing argument.<sup>15</sup>

Earlier commentary on the Standard indicated that Disciplinary Rule (DR) 7-102(A)(7) of the ABA *Model Code of Professional Responsibility* (Code) implicitly approved the free narrative approach. This assertion was qualified in a later commentary in which the Standard was said to "take into account" DR 7-102(A)(4) and (7) by simply avoiding their violation.<sup>16</sup> One commentator has suggested that the Standard barely misses violating the Disciplinary Rules and certainly fails to further the intent of Ethical Consideration (EC) 7.26.<sup>17</sup>

The proposed Standard was withdrawn prior to submission of the Defense Function chapter to the ABA House of Delegates in February 1979. At that time, the ABA's Special Commission on Evaluation of Professional Standards was formulating policy to ad-

If, in advance of trial, the defendant insists that he or she will take the stand to testify perjurally, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.

*Id.* Standard 4-7.7(b).

15. Subsection (c) provides:

If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjurally in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

*Id.* Standard 4-7.7(c).

16. Wolfram, *supra* note 6, at 849 n.156 (quoting PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION Supplement, at 18 (Approved Draft 1971)).

17. *Id.*; see *supra* note 5 for text of DR 7-102(A)(4) & (7) and EC 7-26.

dress the problem of the perjurious client.<sup>18</sup> In August 1983, the ABA House of Delegates approved Rule 3.3 of the *Model Rules of Professional Conduct* (Model Rules).<sup>19</sup> Model Rule 3.3, entitled "Candor Toward the Tribunal," includes no reference to the free narrative. Indeed, the commentary on the rule rejects use of the narrative. In the ABA's estimation, the free narrative "compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel."<sup>20</sup> Although Standard 4-7.7 has not represented ABA policy since 1979 and no longer exists in any form, it is still cited by defense counsel and relied on by some courts.<sup>21</sup> While *Sanborn v. State*<sup>22</sup> was a case of first impression in Florida concerning the free narrative approach, several other state courts and four federal courts have tried to resolve the constitutional and practical difficulties inherent in the Standard.

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18. STANDARDS, *supra* note 12, at Standard 4-7.7.

19. Rule 3.3 provides in part:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

...

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [governing confidentiality of information between lawyer and client].

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983).

20. *Id.* Rule 3.3 comment.

21. MacCarthy & Mejia, *The Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and a Hard Place*, 75 J. CRIM. L. & CRIMINOLOGY 1197, 1205 (1984). The United States Courts of Appeal for the Eighth and Ninth Circuits have approved the free narrative. *Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984), *rev'd*, *Nix v. Whiteside*, 106 S. Ct. 988 (1986); *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). The Fifth and Seventh Circuits have implicitly rejected the approach. *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984); *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967), *aff'd after remand*, 398 F.2d 342 (5th Cir. 1968).

22. 474 So. 2d 309 (Fla. 3d DCA 1985).

## II. CONSTITUTIONAL FRAMEWORK

The criminal defendant's right to a fair trial is protected by the due process clauses of the Constitution<sup>23</sup> and the sixth amendment, which is applied to the states through the fourteenth amendment.<sup>24</sup> The various provisions of the sixth amendment define the fundamental aspects of a fair trial, including the right to assistance of counsel.<sup>25</sup> The sixth amendment right to counsel is crucial to the adversarial system. Only with the skill and knowledge provided by counsel can an accused effectively meet the state's case. More fundamentally, the assistance of counsel allows individuals involved in the trial and society at large to justifiably rely on the trial's outcome.<sup>26</sup>

Under ABA policy, criminal defense counsel are not exempt from the general rule that requires an advocate to disclose a client's perjury concerning a material fact.<sup>27</sup> However, ABA commentary in the Model Rules subordinates this ethical duty to due process and right to counsel guarantees. These constitutional rights may qualify an otherwise absolute ethical duty of defense counsel to disclose client perjury to the tribunal.<sup>28</sup>

The Supreme Court recognizes that, whether appointed or retained, an attorney must play an active role in the adversarial pro-

23. The fifth amendment provides, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

The fourteenth amendment provides, in part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

24. "Because these rights are basic to our adversary system of criminal justice, they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States." *Faretta v. California*, 422 U.S. 806, 818 (1975). See also *Gideon v. Wainwright*, 372 U.S. 335, 339-42 (1963); *United States ex rel. Reis v. Wainwright*, 525 F.2d 1269, 1273 (5th Cir. 1976).

25. The sixth amendment provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

26. *Strickland v. Washington*, 466 U.S. 668, 685, 692 (1984).

27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

28. *Id.*

cess.<sup>29</sup> More than his mere presence at trial is required because the sixth amendment guarantee encompasses "the right to the *effective* assistance of counsel."<sup>30</sup> The purpose of effective assistance is to guarantee a fair trial, although the elements that comprise such assistance are not found in the constitutional language. "[The sixth amendment] relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions."<sup>31</sup>

There is support for the proposition that a constitutional right to testify can be found in the confrontation and compulsory process clauses and the due process clauses.<sup>32</sup> The Supreme Court has yet to hold that a constitutional right to testify exists, but it has asserted the proposition in dicta in numerous cases. In *Harris v. New York*,<sup>33</sup> the Court noted that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so."<sup>34</sup> In *Faretta v. California*,<sup>35</sup> the Court, again in dictum, observed that it "has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right . . . to testify on his own behalf . . . ."<sup>36</sup> To support this proposition, the Court cited only to dicta in prior cases.<sup>37</sup> In a recent decision, *Nix v. Whiteside*,<sup>38</sup> the Court remarked that the due process right of an accused to testify in his own behalf, while never explicitly held to exist, "has long been assumed."<sup>39</sup> The Court also referred to *Harris* for the proposition that the right to testify in one's own defense does not encompass the right to commit perjury; once a defendant takes the

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29. *Strickland*, 466 U.S. at 685.

30. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

31. *Strickland*, 466 U.S. at 688.

32. Rieger, *supra* note 6, at 134-35. See, e.g., *Whiteside v. Scurr*, 744 F.2d 1323, 1329-30 (8th Cir. 1984), *rev'd*, *Nix v. Whiteside*, 106 S.Ct. 988 (1986); see also *Wright v. Estelle*, 572 F.2d 1071, 1076 (5th Cir.) (Godbold, J., dissenting) ("The right to testify also may be considered as included in the Sixth Amendment's guarantees of the defendant's right to meet and deny the accusation against him, . . . his right to present evidence, and his right to present witnesses on his behalf . . . ." (citations omitted)), *cert. denied*, 439 U.S. 1004 (1978).

33. 401 U.S. 222 (1971).

34. *Id.* at 225.

35. 422 U.S. 806 (1975).

36. *Id.* at 819 n.15.

37. *Id.* See also Rieger, *supra* note 6, at 131-32.

38. 106 S. Ct. 988 (1986).

39. *Id.* at 993.



stand an obligation to speak truthfully attaches.<sup>40</sup> The Court noted that "*Harris* and other cases make it crystal clear that there is no right whatever—constitutional or otherwise—for a defendant to use false evidence."<sup>41</sup>

### III. FLORIDA AND THE FREE NARRATIVE

The Third District Court of Appeal noted that *Sanborn v. State*<sup>42</sup> was a case of first impression in Florida.<sup>43</sup> Sanborn was to stand jury trial on charges of first-degree murder and several other crimes. Trial had been delayed for several months because Sanborn had successfully claimed that conflicts warranted dismissal of two of his three previous court-appointed attorneys. The court permitted a fourth attorney, Ellis Rubin, to be substituted only after receiving assurances from Sanborn that he would see the process through with this defense counsel. However, on the day of trial and just before jury selection, Rubin moved to withdraw. Rubin declined to reveal his reasons for requesting withdrawal, merely alluding to "new and contradictory details and heretofore unknown explanations" provided to him by Sanborn and Sanborn's mother.<sup>44</sup> The trial court denied the motion and ordered Rubin to proceed to trial. Rubin then petitioned the Third District for writ of certiorari and the proceedings were stayed pending that court's decision.

At the outset, the Third District recognized the role of defense counsel "as a guardian of the integrity of the judicial system,"<sup>45</sup> and deemed Rubin's actions in keeping with the moral and ethical obligations of an attorney. Rubin had told the trial court judge in so many words that he believed his client would perjure himself, and he refused to reveal any of the underlying facts. The court cited DR 7-102(A) of the *Florida Bar Code of Professional Responsibility*<sup>46</sup> for the proposition that a lawyer shall not knowingly use perjured testimony or assist a client in knowingly fraudulent conduct. The court also found germane EC 7-25, which provides

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40. *Id.* at 998.

41. *Id.*

42. 474 So. 2d 309 (Fla. 3d DCA 1985).

43. The court relied in large measure on *People v. Schultheis*, 638 P.2d 8 (Colo. 1981), and *People v. Salquerro*, 433 N.Y.S.2d 711 (N.Y. Sup. Ct. 1980) in its analysis.

44. *Sanborn*, 474 So. 2d at 311.

45. *Id.*

46. See *supra* note 5.

that a lawyer should not use subterfuge to present matters to a jury that it ought not consider.<sup>47</sup>

Without reference to Standard 4-7.7, the court invoked its provision governing the eventuality of a serious dispute between counsel and client over the client's desire to offer false testimony, counsel is to urge the client to refrain from perjury, but if the client will not be dissuaded, counsel should request permission to withdraw.<sup>48</sup> Counsel must continue to serve if his motion to withdraw is denied and "[s]o long as the attorney performs competently as an advocate under the circumstances, the defendant is represented effectively and the integrity of the adversary system of justice is not compromised."<sup>49</sup>

The *Sanborn* court concluded that a competent performance includes use of the free narrative, the procedure "most often sanctioned" of those "formulas . . . which preserve the sanctity of the tribunal."<sup>50</sup> In the eyes of the court, use of the free narrative shifts the responsibility for committing fraud on the tribunal entirely to the defendant. If the attorney neither elicits nor argues the perjurious testimony, counsel does not "knowingly assist or participate in the commission of perjury or the creation of false evidence."<sup>51</sup>

The court acknowledged that automatic withdrawal and reappointment of defense counsel was not the solution. The court was sensitive to at least two aspects of fraud that could be engendered by permitting this "ostrich-like approach."<sup>52</sup> First, there is the opportunity to "play the system" through an endless series of late motions to withdraw and subsequent continuances. The orderly administration of justice, which the court deemed its primary responsibility, would certainly suffer from this procedural fraud. Second, a substantive fraud would be committed upon the court. Substituted counsel might not discover or recognize that a client intended perjury, and so present and argue false testimony to the factfinder. Moreover, cynical counsel might do so willingly.<sup>53</sup> Wittingly or unwittingly, the party perpetrating the fraud would be the substituted defense counsel. Thus it is a puzzle to determine how Standard 4-7.7 and the free narrative operate to excuse de-

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47. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-25 (1983).

48. *Sanborn*, 474 So. 2d at 312.

49. *Id.*

50. *Id.* at 313.

51. *Id.*

52. *Id.* at 314 (quoting *Salquerro*, 433 N.Y.S.2d at 713).

53. *Id.*

fense counsel from responsibility for that fraud. If the attorney knows that perjury is imminent but allows the client to take the stand and offer the perjury in narrative form, how is it that counsel has not knowingly assisted or participated in the commission of perjury or the creation of false evidence? The inescapable conclusion is that never before has silence counted for so much.

That the court in *Sanborn* did not make a principled distinction between silent and overt facilitation of perjury is evidenced by its approval of the position taken by the Arizona Supreme Court in *State v. Lee*.<sup>54</sup> When defense counsel is confronted with a perjurious client and must choose a course of action, the court directed:

In such a case, counsel must, within the confines of the law and his or her professional duties and responsibilities, present the client's case as well as he or she can. . . . Counsel must not compromise the integrity of his or her client, the court, or the legal profession by exposing a client's proclivities or by engaging in unethical conduct at a client's request.<sup>55</sup>

The concern of the Arizona Supreme Court and, by implication, the Florida court, that defense counsel not compromise the client's integrity is mystifying. One would suppose that the client's integrity already had been compromised by his decision to testify falsely. At that juncture, the larger concern should be with the integrity of the court and the legal profession. How defense counsel's knowing silence in the face of perjury avoids institutional damage is not explained by either court. An admonition to defense counsel to simply try one's best to present a defense that will not offend legal or ethical responsibilities is of no more help than simply "throwing up one's hands."<sup>56</sup> "To leave such choice open to the sensitive and the responsible without giving them criteria for choice is to leave it open as well to the insensitive and the corrupt."<sup>57</sup> As a vehicle to bring perjured testimony before a purposely unenlightened factfinder, the free narrative makes meaningless any distinctions between the responsible and the corrupt.

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54. 689 P.2d 153 (Ariz. 1984). This case involved perjurious witnesses rather than a perjurious defendant, which altered the constitutional issue. See *infra* notes 77-87 and accompanying text.

55. *Id.* at 163-64.

56. S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 162 (1978).

57. *Id.*

#### IV. APPLICATION IN OTHER JURISDICTIONS

Contrary to the court's assertion in *Sanborn*, Standard 4-7.7 cannot be regarded as a useful solution to the problem of the perjurious client. It has received a mixed response from those courts which have considered its use, particularly with regard to the free narrative.

##### A. Arizona

The oscillations of the Arizona courts addressing the problem of the perjurious client expose the free narrative as ineffectual and an impediment to criminal adjudication. Arizona cases demonstrate the difficulties inherent in using the Standard to minimize the damage caused by the perjurious client.

The Arizona Supreme Court in *State v. Lowery*<sup>58</sup> assessed the use of Standard 4-7.7 in a nonjury murder trial. Lowery had pled not guilty. Trial court testimony established that the victim was shot twice at close range while he was seated in a parked car. The state's chief witness testified that he saw Lowery walk with the victim to the car and wait until the the victim got in. Then the witness heard firecracker sounds.<sup>59</sup> From the witness stand, however, Lowery denied accompanying the victim or shooting him. Defense counsel Lyding then asked for a recess and, in chambers, asked to withdraw. In accordance with Standard 4-7.7, Lyding did not tell the court the reason for his withdrawal motion; the motion was denied. When trial resumed, Lyding immediately stated that he had no more questions for his client, and in his closing argument he made no use of her testimony. Lowery was convicted of second-degree murder and the Supreme Court of Arizona affirmed.<sup>60</sup>

The Arizona Supreme Court noted that Lyding's conduct was unusual in that jurisdiction, and that the "better practice would have been for [Lyding] to have refrained from further questioning in areas of possible perjury and to have [made] a record 'in some appropriate manner,'" but under the facts the court found no prejudice against Lowery. The court concluded that, due to the strength of the evidence against Lowery, Lyding's "conduct played very little, if any, part in [Lowery's] conviction."<sup>61</sup>

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58. 523 P.2d 54 (Ariz. 1974).

59. *Lowery v. Cardwell*, 575 F.2d 727, 728 (9th Cir. 1978).

60. *Id.* at 729.

61. *Lowery*, 523 P.2d at 57.

The United States Court of Appeals for the Ninth Circuit disagreed and granted Lowery a writ of habeas corpus. In *Lowery v. Cardwell*,<sup>62</sup> the court held that Lyding's actions constituted a "clear and unequivocal" announcement to the court as factfinder that he believed his client had testified perjurally, thus depriving Lowery of her right to a fair trial.<sup>63</sup> The court found no due process violation in Lyding's compliance with the Standard by refusing to assist in his client's perjury; rather, the court objected to his motion to withdraw as constituting a wholesale surrender of the client's interests in an active defense. In a special concurrence, Judge Hufstedler sonorously observed that "[n]o matter how commendable may have been counsel's motives, his interest in saving himself from potential violation of the canons was adverse to his client, and the end product was his abandonment of a diligent defense."<sup>64</sup>

Although Judge Hufstedler collapsed the ethical duty of an officer of the court into nothing more than parochial self-interest, the majority acknowledged the anomalous result of declaring a mistrial due to defense counsel's "bona fide efforts to avoid professional irresponsibility."<sup>65</sup> The court observed that in reconciling a criminal defendant's right to due process with defense counsel's ethical duty not to further false testimony, "the integrity of the judicial process must be allowed to play a respectable role."<sup>66</sup> The court went no further in explaining what a "respectable" role might consist of, but *Lowery* suggests that integrity enjoys only a cameo appearance.

The Ninth Circuit distinguished *Lowery* in *United States v. Campbell*<sup>67</sup> on the sole basis that in the former case, the judge sat as factfinder, while the latter was tried before a jury.<sup>68</sup> In *Campbell*, defense counsel attempted to comply with Standard 4-7.7, but

62. 575 F.2d 727 (9th Cir. 1978).

63. *Id.* at 731.

64. *Id.* at 732 (Hufstedler, J., specially concurring).

65. *Id.* at 731.

66. *Id.*

67. 616 F.2d 1151 (9th Cir.), *cert. denied*, 447 U.S. 910 (1980).

68. A Texas appellate court has drawn the same distinction between factfinders. In *Maddox v. State*, 613 S.W.2d 275 (Tex. Crim. App. 1981), defense counsels informed the court of their client's intention to commit perjury. The defendant was permitted to testify in narrative form. The court found the violation of Standard 4-7.7—explicitly informing the judge—to be minor because both findings of fact and sentencing devolved to the jury. Damning with faint praise, the court offered its assessment of the free narrative: "[t]o say that the method used in this case may not have been the best is not to say that it deprived the appellant of effective assistance of counsel." *Id.* at 284.

told the trial court in the jury's presence that Campbell was testifying against his advice. The prosecutor unsuccessfully objected to the narrative form of Campbell's testimony as irrelevant. Defense counsel subsequently did not raise any objections to examination by the prosecutor, nor did he use the narrative testimony in closing. On appeal from his armed robbery conviction in federal district court, Campbell contended that his counsel's actions amounted to informing the jury that Campbell had committed perjury.<sup>69</sup>

Scarcely sounding like the same court, the Ninth Circuit stated that it was a mistake to have so informed the court in the jury's presence, but a mistake that any competent defense counsel might make in the course of meeting ethical obligations.<sup>70</sup> In *Lowery*, the mere attempt to withdraw signaled the perjury and was fatal to the client's interests, yet in *Campbell* the court overlooked a similar action because the jury was regarded as unable to see the significance of counsel's request to withdraw.

The Ninth Circuit's sanguine approach in *Campbell* appears to have arisen from a belief that a jury is more easily misled than a judge, and that a jury's misapprehensions do no damage to the perjurious client. The court observed that a jury is not usually aware of an attorney's ethical problems and "could . . . [interpret] counsel's actions as a desire to keep Campbell off the stand so that Campbell's prior robbery convictions would not be used for impeachment purposes and to protect Campbell from potentially damaging cross-examination."<sup>71</sup>

Its decision having been disapproved on collateral review in *Lowery*, the Arizona Supreme Court displayed an abundance of caution in *State v. Jefferson*.<sup>72</sup> Defense counsel Lavoni sought to withdraw just prior to Jefferson's testifying at his probation revocation hearing; however, Lavoni would not reveal the specific reasons for his request. The supreme court assessed the trial judge's competence at about the same level as the Ninth Circuit had held the jury's in *Campbell*. The court's review of the record showed that the trial judge had not "fully grasped the implications of counsel's statements" but because of the obvious inference that Jefferson planned to perjure himself, the court surmised that "[s]uch an inference would eventually have occurred to the trial

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69. *Campbell*, 616 F.2d at 1152.

70. *Id.*

71. *Id.* at 1153.

72. 615 P.2d 638 (Ariz. 1980).

judge, . . . [thus] [t]he attempt to withdraw was an unequivocal announcement of the attorney's disbelief of the truthfulness of his client's testimony."<sup>73</sup> The parole revocation was reversed based on the impermissible prejudice to Jefferson caused by Lavoni's conduct. The court directed that on remand, the revocation be determined by a different judge.<sup>74</sup>

After *Jefferson*, any attempt to withdraw by defense counsel in conformance with Standard 4-7.7 amounted to clear notice of the client's intended or actual perjury and was thus unacceptable. However, such a stance did little to resolve the conflict between professional integrity and responsible advocacy. Attempts to withdraw proved no solution. Nor was a remedy provided by waiver of right to counsel or waiver of closing argument.

An Arizona Court of Appeals panel held in *State v. Long*<sup>75</sup> that a claim of ineffective assistance of counsel would not be heard from a defendant who insisted on waiving right to counsel so he could represent himself in order to question his wife on the witness stand. His attorney believed Long's wife would commit perjury and refused to call her as a witness. The court cited Standard 4-7.7 and the *Lowery* decision in approving defense counsel's refusal to include the testimony of the defendant and his wife in his closing argument. However, the court reversed the conviction because, in his rebuttal, the prosecutor had referred twice to the fact that defense counsel in closing argument had conspicuously omitted reference to the wife's statements which absolved Long of guilt.<sup>76</sup>

The court's decision demonstrates an additional burden of silence that use of the free narrative places on the state. The court observed that in *Lowery v. Cardwell*<sup>77</sup> the Ninth Circuit found a denial of due process once the factfinder knew of defense counsel's belief that the defendant had testified perjurally. The state appellate court drew "no distinction when the prosecutor invites the jury to infer that which it cannot be told."<sup>78</sup> It appears that the state may comment on the use of the free narrative only at the risk of committing prejudicial error. The narrative thus operates to silence both prosecution and defense.

73. *Id.* at 641.

74. *Id.*

75. 714 P.2d 465 (Ariz. Ct. App. 1986).

76. *Id.* at 467.

77. 575 F.2d 727 (9th Cir. 1978).

78. 714 P.2d 465, 467 (Ariz. Ct. App. 1986).

*State v. Lee*<sup>79</sup> was another abortive attempt by an Arizona court to fashion an ethical and realistic course of conduct for counsel faced with the prospect of perjurious testimony. In *Lee*, defense counsel independently determined that two defense witnesses planned to commit perjury. Nevertheless, counsel elicited free narrative testimony from them, believing he was compelled to do so because of his client's sixth amendment right to present witnesses in his own behalf. Counsel then waived closing argument rather than argue perjured testimony to the jury.<sup>80</sup> At a post-trial evidentiary hearing, defense counsel stated: "I felt like I had some ethical problems standing up in front of the jury and arguing something that I felt was perjured. In fact, I was convinced and positive that it was perjured. . . . And I think I have some responsibility other than just get my guy off at any costs."<sup>81</sup>

Defense counsel relied on his perception of sixth amendment rights to justify calling witnesses for his client, even though he believed they would lie. The appellate court first stated that there is no constitutional right of defendants to call a witness, much less a witness who presumably will offer perjured testimony.<sup>82</sup> The court then concluded from the record that it would have been possible for defense counsel to argue a theory of defense without referring to the tainted testimony; therefore, the waiver of final argument constituted ineffective assistance of counsel.<sup>83</sup>

When *Lee* was heard on review,<sup>84</sup> the Arizona Supreme Court invoked the test established by the United States Supreme Court in *Strickland v. Washington*.<sup>85</sup> Under *Strickland*, a court must find that counsel's conduct failed to meet the requirements of the sixth amendment assistance of counsel provision, and that the conduct was prejudicial to the defendant.<sup>86</sup> The trial court in *Lee* had found that defense counsel's decision to call the alibi witnesses was not a deliberate trial strategy but was based on an erroneous belief concerning his client's rights. Had it been a purely tactical decision, the Arizona Supreme Court would not have considered waiver of closing argument as grounds for a claim of ineffective assistance

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79. 689 P.2d 170 (Ariz. Ct. App. 1983), *vacated*, 689 P.2d 153 (Ariz. 1984).

80. *Id.* at 172.

81. *Id.* at 174.

82. *Id.* at 173. The court cited to DR 7-102(A)(4), which "specifically precludes an attorney from knowingly using perjured testimony . . . in his representation of a client." *Id.*

83. *Id.* at 175.

84. *State v. Lee*, 689 P.2d 153 (Ariz. 1984).

85. 466 U.S. 686 (1984).

86. *Id.* at 687.



of counsel. However, the court held that "[t]rial decisions that appear to be based on counsel's beliefs respecting his or her duty to the court rather than his or her professional assessment of strategic options are . . . subject to judicial review."<sup>87</sup>

In considering the appellant's claim of ineffective assistance based on trial counsel's disclosure to the court, the supreme court agreed that counsel was in an ethical dilemma. The defendant did not have a right to call perjurious witnesses. Moreover, if defense counsel for ethical or tactical reasons decided against calling a particular witness, he had to follow through with that decision. If the client was seriously antagonized by this, counsel should have requested permission to withdraw, explaining only that an irreconcilable conflict made further representation too difficult.<sup>88</sup> The court outlined these guidelines because "no previous Arizona authority existed to offer counsel guidance."<sup>89</sup> Apparently the supreme court's decision only four years before in *Jefferson* had become an inconvenient precedent. In *Jefferson*, defense counsel's motion to withdraw was characterized as a virtual announcement that the client planned to commit perjury.<sup>90</sup>

### B. Kansas

Whether and to what extent the participants in a criminal trial know perjured testimony is in the offing is a particularly troubling aspect of the free narrative. The Kansas Supreme Court in *State v. Henderson*,<sup>91</sup> in upholding Henderson's conviction, suggested that defense counsel

is never under a duty to perpetrate or aid in the perpetration of a crime or a dishonest act to free his client. Neither is he required to stultify himself by tendering evidence or making any statement which he knows to be false as a matter of fact in an attempt to obtain an acquittal at any cost.<sup>92</sup>

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87. *Lee*, 689 P.2d at 161. The court cited *Johns v. Smyth*, 176 F. Supp. 949, 953 (E.D. Va. 1959), for the proposition that "[t]he failure to argue the case before the jury, while ordinarily only a trial tactic not subject to review, manifestly enters the field of incompetency when the reason assigned is the attorney's conscience."

88. *Lee*, 689 P.2d at 163.

89. *Id.* at 158.

90. See *supra* notes 71-72 and accompanying text.

91. 468 P.2d 136 (Kan. 1970).

92. *Id.* at 140.

Four days before trial Henderson told his attorney, Anderson, a new story that would aid in his defense. When Anderson declined to be a party to a false story, Henderson responded that he "was willing to run the risk of perjury."<sup>93</sup> Before trial, Anderson informed the state and the court of his client's potential perjury and unsuccessfully sought to withdraw. Ultimately, Harrison did not take the stand, although Anderson and the court informed the defendant that he had the right "to tell his story."<sup>94</sup> The court failed to explain how it is that defense counsel can affirmatively act to put his client on the stand to deliver perjurious testimony, and not thereby aid in the perpetration of a crime.

In *State v. Fosnight*,<sup>95</sup> defense counsel moved to withdraw, stating in chambers that he was "caught in a classic awkward professional situation."<sup>96</sup> When he declined to tell the judge the reason for his request, the prosecutor suggested that defense counsel must have been made aware that defendant Fosnight intended to testify perjurally. The judge suggested that Fosnight be told that prosecution and conviction for perjury would constitute his third felony offense. When trial resumed, the defendant was sworn and gave free narrative testimony.<sup>97</sup>

The Kansas Supreme Court observed that the request to withdraw "did not inform the trial judge of anything he would not have surmised at once had counsel simply put the defendant on the stand and permitted him to proceed to tell his story without encouragement or help from counsel."<sup>98</sup> The court distinguished *Lowery* on grounds that the Fosnight trial was by jury, while the court was the factfinder in *Lowery*. Because the jury was unaware of the substance of the in-chambers conference, the court found that Fosnight's right to a fair trial had not been prejudiced.<sup>99</sup>

The Arizona decisions, as well as the two Kansas opinions, present the inescapable conclusion that under Standard 4-7.7, a fair trial for a perjurious client necessarily requires an ignorant factfinder. The Kansas Supreme Court acknowledged that a judge sitting as factfinder would immediately suspect perjury if free narrative testimony were offered; a request to withdraw would engen-

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93. *Id.* at 138.

94. *Id.* at 142.

95. 679 P.2d 174 (Kan. 1984).

96. *Id.* at 177.

97. *Id.*

98. *Id.* at 180 (emphasis added).

99. *Id.* at 181.

der the same suspicion. The logical conclusion is that a fair trial before a judge precludes use of the Standard unless the judge is deaf, dumb, and blind. A fair trial before a jury may only be had if the jury remains ignorant of that which the client, defense counsel, prosecutor, and judge are already aware: perjury is in the air. At the very least the jury must be so naive that it is unable to read the signs of client perjury embodied in defense counsel's actions.

### C. New York

The passivity demanded by the free narrative serves to excuse fraud in the estimation of one New York trial court. In *People v. Salquerro*,<sup>100</sup> the defendant Salquerro was accused of beating and stabbing his victim during a robbery. Just prior to trial, Salquerro told his attorney, Hallinan, that he was going to lie when testifying in his own behalf. Hallinan revealed his client's intention to the court and to the prosecutor, then sought to withdraw on the ground that his disclosure to the court made effective assistance of counsel problematic.<sup>101</sup>

In the court's estimation, an attorney who would knowingly offer perjurious testimony practices a fraud on the tribunal. Thus, the court attempted to link Standard 4-7.7 with two disciplinary rules of the ABA *Code of Professional Responsibility* that prohibit an attorney from knowingly using perjured testimony and require an attorney to reveal a fraud upon a tribunal.<sup>102</sup> In so doing, the court formulated a two-step process to be followed: the attorney must first inform the court of the client's intention to commit perjury, and then follow Standard 4-7.7(c), which provides that defense counsel make a record on his belief that perjury is imminent "without revealing the fact to the court."<sup>103</sup>

More troubling than the internal inconsistency in this two-step approach was the court's cursory treatment of the effect of the Standard on defense counsel. In the court's view, the defendant's rights to assistance of counsel and to speak to the jury under oath are preserved, and at the same time "the defense attorney is *protected* from participation in the fraud."<sup>104</sup> The court simply grants that a fraud has been perpetrated by use of the Standard, yet ac-

100. 433 N.Y.S.2d 711 (N.Y. Sup. Ct. 1980).

101. *Id.* at 712.

102. *See supra* note 5.

103. 433 N.Y.S.2d at 714 (quoting STANDARDS, *supra* note 12, at Standard 4-7.7).

104. *Id.* (emphasis added).

cords defense counsel the status of a nonparticipant if, during his client's perjury, he will only stand mute as a wooden-headed puppet.<sup>105</sup>

#### D. District of Columbia

The District of Columbia courts have treated Standard 4-7.7 as appropriate for both bench and jury trials yet also have suggested that defense counsel may nevertheless be subject to discipline if the Standard is used. In *Thornton v. United States*,<sup>106</sup> the court of appeals affirmed a trial court decision which held that Thornton was not denied effective assistance of counsel although his attorney followed Standard 4-7.7. In a familiar scenario, on the eve of his trial, the defendant, faced with strong evidence of his guilt, formulated an alibi. Defense counsel sought to withdraw, after explaining to the judge and prosecutor his ethical dilemma: "My client now decides he is going to state another and completely different story than what he told me before, which I know enough to be true. In presenting it to the Court in this case I feel that I would be violating the canons of ethics."<sup>107</sup>

The trial judge was sympathetic and imaginative. In a maneuver the appellate court characterized as a "novel solution," the trial judge did not rule on the motion to withdraw. Instead, he certified the case to a second judge, instructed that judge not to ask counsel's reason for attempting to withdraw, and suggested to counsel that he follow Standard 4-7.7. Leave to withdraw was denied by the second judge, reasonably so, because no justifiable explanation was offered. Trial resumed "with defense counsel's ethical problem undiminished."<sup>108</sup>

However, in violation of the Standard, defense counsel informed the second judge that Thornton would take the stand against his advice. The defendant did take the stand and presented a "transparent" alibi, with minimal assistance from defense counsel. Any shred of credibility the testimony may have had was lost when the government impeached Thornton with prior inconsistent statements. Defense counsel did conform to the Standard in making no

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105. Foster, *The Devil's Advocate*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 229, 231 (1980).

106. 357 A.2d 429 (D.C.), cert. denied, 429 U.S. 1024 (1976).

107. *Id.* at 432.

108. *Id.*

mention of the perjured testimony in closing argument, instead choosing to attack the government's evidence.<sup>109</sup>

After Thornton was convicted of felony murder, armed robbery, and assault with a dangerous weapon, he claimed ineffective assistance of counsel. Thornton maintained that "counsel's performance at trial was so influenced by his belief that his client's changed story was not truthful, and by his consequent desire to disassociate himself from the perjurious testimony, that he failed to provide vigorous assistance to his client."<sup>110</sup> The court, on the other hand, described counsel's performance as meritorious and observed that counsel's use of the Standard did not "significantly" advance the alibi testimony, nor did counsel "foist" on the court a perjurious defense.<sup>111</sup>

While the court of appeals in *Thornton* did not dispute the trial court's suggestion that counsel adhere to Standard 4-7.7, it did find objectionable a similar tack by the trial court in *Johnson v. United States*.<sup>112</sup> The trial court perceived inconsistencies between Johnson's two proffered defenses and was of the opinion that defense counsel would suborn perjury if he aided in presenting the second version. The trial court approved the approach of Standard 4-7.7 and indicated that ethical canons required defense counsel to employ the free narrative. However, the appellate court refused to extend the logic of *Thornton* to allow the Standard to be imposed by the court rather than be self-imposed by defense counsel.<sup>113</sup>

The appellate court rejected the proposition that the trial court was under any responsibility to oversee an attorney's ethical conduct during the trial. The court suggested that if a trial court suspects that a defendant intends perjury and it disapproves of counsel's decision to put the client on the stand, the proper recourse is for the trial court "to report the matter to the Board of Professional Responsibility for such disciplinary action as may be indicated."<sup>114</sup> Under *Thornton* and *Johnson*, both jury cases, defense counsel retains full responsibility with regard to use of the free narrative. The court may notify defense counsel of suspicions concerning a defendant's testimony, but counsel alone must decide whether use of the Standard is appropriate.

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109. *Id.* at 433-34.

110. *Id.* at 437.

111. *Id.* at 438.

112. 404 A.2d 162 (D.C. 1979).

113. *Id.* at 164.

114. *Id.* at 165.

The court of appeals labored to reconcile *Thornton* and *Johnson* in *Butler v. United States*<sup>115</sup> involving a bench trial. A split court reversed Butler's conviction for assaulting a police officer and carrying an unlicensed firearm. Butler privately admitted to his attorney that he had a gun at the time of his arrest, this admission was consistent with the police report. At a preliminary motion hearing, defense counsel stated his expectation that his client wanted to testify "because he's told me before that he had the pistol, and today for the first time he tells me that's not true."<sup>116</sup>

Because Butler was given a bench trial before the same judge who presided over the motion hearing, the court held that Butler received ineffective assistance of counsel. By approving the procedure in Standard 4-7.7 as the preferable course of action, the court reaffirmed the "implicit holdings" of *Thornton* and *Johnson*.<sup>117</sup> The plurality perverted what scant rationale is found in *Lowery v. Cardwell*<sup>118</sup> by implying that the Standard could be used in a bench trial so long as counsel does not "act in such a fashion as to disclose his quandary to the factfinder."<sup>119</sup> The court thus overlooked entirely the admonition in *Lowery* that compliance with the first step of the Standard, moving to withdraw, would inform the factfinder that defendant's testimony was perjurious.

The dissent correctly observed that in *Thornton*, the court had in fact held that a defendant was not deprived of effective assistance of counsel when defense counsel complied with the Standard, and that under *Johnson* the trial judge may not force the Standard on defense counsel.<sup>120</sup> Neither opinion even suggested that the Standard enjoyed preference over other approaches. According to the dissent, defense counsel would be better served by looking to the court's rules to resolve the problem, "rather than the recommendations of a nonjudicial organization, no matter how respected."<sup>121</sup> Finally, the dissent noted its inability to see how Butler was deprived of due process, "unless the majority feels that appellant was entitled to a trial before a judge ignorant of his intention to commit perjury and therefore perhaps ready to swallow

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115. 414 A.2d 844 (D.C. 1980) (en banc).

116. *Id.* at 845.

117. *Id.* at 850.

118. 575 F.2d 727 (9th Cir. 1978).

119. 414 A.2d at 850 (quoting *Lowery v. Cardwell*, 575 F.2d 727, 731 (9th Cir. 1978)).

120. *Id.* at 858 (Reilly, C.J., dissenting).

121. *Id.*

whole whatever testimony appellant chose to give in that proceeding."<sup>122</sup>

### E. Colorado

One of the precedents relied upon by the Florida court in *Sanborn v. State*<sup>123</sup> was *People v. Schultheis*.<sup>124</sup> In that case, the Colorado Supreme Court drew an analytical distinction between the client who wishes to elicit perjurious testimony from alibi witnesses and one who wishes to testify perjurally in his own behalf. Like the Arizona case, *State v. Lee*,<sup>125</sup> *Schultheis* concerned alibi witnesses.<sup>126</sup>

The facts involved a particularly brutal rape and murder committed by Schultheis, a prison inmate. After offering a plea of not guilty by reason of insanity, Schultheis was examined by two court-appointed psychiatrists. In the course of one examination, the defendant gave a highly detailed description of the manner in which he had killed the victim.<sup>127</sup> Results of the psychiatric examinations were made available to the prosecutor, trial judge, and defense counsel.<sup>128</sup>

On the day of trial, Schultheis requested a continuance on grounds that his attorney was inadequate and unprepared. The trial court denied the motion and also denied defense counsel's request to withdraw due to irreconcilable differences. Schultheis and counsel were allowed to make a private record to set out the basis of their disagreement. According to this record, defense counsel refused to subpoena two alibi witnesses because he thought they would testify falsely that Schultheis was not in the cell with the victim at the time of the murder. In fact, Schultheis admitted the killing to psychiatrists and to counsel. After making his record, to which the judge and prosecutor were not given access, defense

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122. *Id.* at 861.

123. 474 So. 2d 309 (Fla. 3d DCA 1985).

124. 638 P.2d 8 (Colo. 1981).

125. 689 P.2d 153 (Ariz. 1984); see *supra* notes 79-89 and accompanying text.

126. With regard to the perjurious client, the court may, by implication, have approved the solution suggested by Erickson, *supra* note 5, at 88-91. *Schultheis*, 638 P.2d at 11, n.3. Erickson proposed the adoption of ABA Defense Standard 4-1.4, see STANDARDS, *supra* note 12, at Standard 4-1.4, which provides for an advisory council of trial lawyers that would, through a system of written statements and recommendations, help resolve ethical dilemmas such as the perjurious defendant. The council would preclude need for the free narrative option. In any case, the court in *Schultheis* did not endorse the free narrative.

127. *Schultheis*, 638 P.2d at 10 n.2.

128. *Id.* at 10 n.1.

counsel continued to represent Schultheis, who was ultimately convicted of first-degree murder.<sup>129</sup>

The state supreme court affirmed the conviction, holding that "a lawyer may not offer testimony of a witness which he knows is false, fraudulent, or perjured."<sup>130</sup> To hold otherwise would have allowed defense counsel to suborn perjury, and the court refused to allow "the truthfinding process to be deflected by the presentation of false evidence by an officer of the court."<sup>131</sup> The court discussed the necessity that counsel, before requesting permission to withdraw, attempt to dissuade the client from calling witnesses who will perjure themselves. But, the court did not endorse use of the free narrative in this context. It merely remarked that continued "competent performance" by defense counsel, whatever that may entail, would ensure effective representation and thus leave unscathed the adversary system of justice.<sup>132</sup> According to the Supreme Court of Colorado, the integrity of trial proceedings is held intact if the factfinder remains "untainted by accusations that the defendant had insisted upon presenting fabricated testimony."<sup>133</sup>

#### F. *The Seventh and Fifth Circuits*

In addressing the claim that putting on no defense at all amounts to ineffective assistance of counsel, the United States Court of Appeals for the Seventh Circuit observed in *United States v. Ramsey*<sup>134</sup> that "[s]omething can be worse than nothing. An incredible defense may lead the judge to augment the punishment"<sup>135</sup> based on the defendant's perjury. When there is "'no bona fide defense to the charge, counsel cannot create one and may disserve the interest of his client by attempting a useless charade.'"<sup>136</sup>

Prior to *Ramsey* the Seventh Circuit had decided *United States v. Curtis*,<sup>137</sup> in which defense counsel Gant refused to put his client on the stand. Gant offered two reasons for this decision. One was that if Curtis were put on the stand the defense would be hurt by

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129. *Id.* at 10.

130. *Id.* at 11.

131. *Id.*

132. *Id.* at 13.

133. *Id.*

134. 785 F.2d 184 (7th Cir.), cert. denied, 106 S. Ct. 2924 (1986).

135. *Id.* at 194 (emphasis in original).

136. *Id.* (quoting *United States v. Cronin*, 466 U.S. 648, 656-57 n.19 (1984)).

137. 742 F.2d 1070 (7th Cir. 1984), cert. denied, 106 S. Ct. 1374 (1986).



exposure on cross-examination of Curtis' prior convictions. Also, Gant believed that Curtis would perjure himself because he had previously admitted to Gant his participation in the crime.<sup>138</sup>

The court limited the scope of its decision to the sole issue of whether Gant's actions infringed on the defendant's constitutional right to testify *truthfully* in his own behalf.<sup>139</sup> The court found no such infringement and added that there is no constitutional right to testify perjurally in one's own behalf,<sup>140</sup> foreshadowing the Supreme Court's view in *Nix v. Whiteside*.<sup>141</sup> The court declined to address whether counsel's actions conformed to professional standards, although it noted the existence of Standard 4-7.7.<sup>142</sup> While the Seventh Circuit did not take a position, the Supreme Court has cited *Curtis* for the proposition that the Seventh Circuit is among those courts that have rejected the free narrative in favor of a more rigorous standard.<sup>143</sup>

The United States Court of Appeals for the Fifth Circuit by implication disapproved the free narrative in *McKissick v. United States*.<sup>144</sup> Defendant McKissick was on trial for unlawfully selling amphetamines to a federal drug agent. At the close of his testimony, presumably obtained through the usual mode of question and answer, the trial judge dismissed the jury for the day. The court then put a number of questions to McKissick in the manner of a cross examination. The trial judge then remarked that McKissick's performance was "'the worst case of perjury . . . I have ever seen since I have been on the Bench.'" <sup>145</sup> That evening, McKissick called his defense counsel, Lowery, and admitted to the perjury. The following day, defense counsel reported his conversation to the trial court and successfully moved for a mistrial.<sup>146</sup>

The Fifth Circuit noted that the lower court correctly declared a mistrial based on the report of his client's perjury by defense counsel "who is an officer of the court and whose integrity the court itself ordinarily is in position to judge."<sup>147</sup> One reason Lowery was obligated to report McKissick's perjury was the necessity "to with-

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138. *Id.* at 1075.

139. *Id.* at 1076 n.4.

140. *Id.* at 1076.

141. 106 S. Ct. 988 (1986); see *supra* text accompanying notes 165-74.

142. *Curtis*, 742 F.2d at 1076-77 n.4

143. *Nix v. Whiteside*, 106 S. Ct. 988, 996 n.6 (1986).

144. 379 F.2d 754 (5th Cir. 1967), *aff'd after remand*, 398 F.2d 342 (5th Cir. 1968).

145. *Id.* at 758.

146. *Id.*

147. *Id.* at 761.

draw the perjured testimony from the consideration of the jury."<sup>148</sup> The court noted with approval the case of *In re King*,<sup>149</sup> where the Utah Supreme Court made clear the professional, ethical, and public duty to disclose a client's perjury:

We cannot permit a member of the bar to exonerate himself from failure to disclose known perjury by a . . . statement that . . . he had a duty of non-disclosure so as to protect his client which is paramount to his duty to disclose the same to the court, of which he is an officer, and to which he in fact, owes a primary duty under circumstances such as are evidenced in this case.<sup>150</sup>

The Fifth Circuit reiterated this view, finding disclosure "essential for good judicial administration and to protect the public."<sup>151</sup> Among the federal courts, the Fifth Circuit has the clearest view of the duty owed by defense counsel as an officer of the court. Perhaps for that reason, the Fifth Circuit accords a higher place to the truthfinding function of a trial than does any other federal circuit court. That function can only be hindered by the free narrative.

#### G. Iowa

In *State v. Whiteside*,<sup>152</sup> the Supreme Court of Iowa affirmed a second-degree murder conviction. Defendant Whiteside had stabbed his victim to death during an argument over a drug deal. Whiteside maintained that he "thought" the victim had a gun and therefore he had acted in self-defense. A week before trial, he told his defense counsel, Robinson, and an associate, Paulsen, that he had actually seen a gun in the victim's hand. When pressed for details, Whiteside retorted that if he didn't say he saw a gun, he would be "dead."<sup>153</sup>

Robinson first told Whiteside that even if there were no gun, a defense could be mounted based on his reasonable belief that the victim was reaching for a gun. Robinson also informed his client that any recollections beyond reasonable belief would be perjury and that he would not permit his client to testify falsely. Robinson added that he might have to inform the court of the perjury and

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148. *Id.*

149. 322 P.2d 1095 (Utah 1958).

150. *Id.* at 1097, cited with approval in *McKissick*, 379 F.2d at 761 n.2.

151. *McKissick*, 379 F.2d at 761.

152. 272 N.W.2d 468 (Iowa 1978).

153. *Id.* at 470

probably would be permitted to impeach that testimony.<sup>154</sup> In a post-trial motion, Whiteside claimed that he was denied a fair trial because Robinson would not allow him to present what would have been a good defense.<sup>155</sup>

In affirming Whiteside's conviction the Supreme Court of Iowa cited a Third Circuit opinion for the proposition that defense counsel ought not act as factfinder, deciding the truthfulness or falsity of evidence unless there exists compelling support for counsel's conclusion.<sup>156</sup> The court found strong support for Robinson's apprehension of imminent perjury and recognized that counsel's action was justified under the *Iowa Code of Professional Responsibility for Lawyers*, including DR 4-101(C) and DR 7-102(A)(4).<sup>157</sup>

Whiteside subsequently sought a writ of habeas corpus, claiming that counsel's threats to withdraw, inform the trial judge, and possibly testify against him violated his right to effective assistance of counsel and the right to marshal a defense. The district court denied the petition and Whiteside appealed to the United States Court of Appeals for the Eighth Circuit.<sup>158</sup>

In *Whiteside v. Scurr*,<sup>159</sup> the Eighth Circuit assumed for purposes of analysis that Whiteside would have testified falsely. The court agreed that Robinson's actions prevented the defendant from testifying falsely. Incredibly, the court then held that because Whiteside was prevented from lying to the factfinder, he was denied due process and effective assistance of counsel.<sup>160</sup> Having characterized counsel's remonstrance as a threat, the court had no difficulty finding both unethical conduct and a deprivation of constitutional rights. Although the court took pains to disassociate itself from any ethical considerations, it did state that Robinson had breached his state code, the Model Rules, and Standard 4-7.7.<sup>161</sup>

The Eighth Circuit denied a motion for rehearing en banc.<sup>162</sup> In a strenuous dissent, a minority of the court objected to the essence

154. *Nix v. Whiteside*, 106 S. Ct. 988, 992 (1986).

155. *Whiteside*, 272 N.W.2d at 470.

156. *Id.* (citing *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d Cir. 1977)).

157. *Id.* at 471. See *supra* note 5 for discussion of these provisions.

158. *Whiteside v. Scurr*, 744 F.2d 1323, 1326 (8th Cir. 1984), *rev'd*, 106 S. Ct. 988 (1986).

159. *Id.*

160. *Id.* at 1328-31.

161. *Id.* at 1329-31. The court appended the Standard and Model Rule 3.3 to the opinion. See *supra* notes 13-15 & 19 for the text of these provisions.

162. *Whiteside v. Scurr*, 750 F.2d 713 (8th Cir. 1984). In its order denying rehearing, the court claimed its prior opinion did not create a right to commit perjury. *Id.* at 714.

of the panel's opinion: "that a lawyer who makes use of a private dialogue with his client to dissuade the client from testifying falsely is burdened by a conflict of interest, is disloyal, is less than zealous, and is guilty of compromising the client's right to testify in his own defense."<sup>163</sup> The dissent preferred the rationale of the Iowa Supreme Court, wherein a duty of honest, loyal, and faithful representation is owed a client, but only to the extent of using fair and honorable means.<sup>164</sup>

The United States Supreme Court also preferred the state court's rationale. In *Nix v. Whiteside*,<sup>165</sup> the Supreme Court unanimously reversed the Eighth Circuit. Four justices joined Chief Justice Burger in declining to stretch an attorney's duty of confidentiality to cover the client's perjury. The court likened the crime of perjury under the facts of *Whiteside* to the crime of threatening or tampering with a witness or juror. As an officer of the court and a key figure in the criminal justice system, an ethical lawyer's responsibility remains the same when faced with any of those actions by a client.<sup>166</sup>

All the justices agreed there had been no violation of defendant's sixth amendment rights under the first prong of the *Strickland* test.<sup>167</sup> In judging whether there was prejudice as required for relief under the second part of the *Strickland* inquiry, the Court again observed that "[a] defendant has no entitlement to the luck of a lawless decisionmaker."<sup>168</sup> The majority believed Robinson's conduct easily came within accepted standards of professional conduct whether viewed as a threat or as a successful attempt to discourage *Whiteside* from testifying perjurally.<sup>169</sup> The Court noted that the free narrative has been found by most courts as well as the American Bar Association to be incompatible with established standards of ethical behavior.<sup>170</sup> Justice Blackmun disagreed with the majority approach in canvassing the range of reasonable professional conduct.<sup>171</sup> The Court in *Strickland* had suggested the easier and more usual course of disposing of an ineffectiveness

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163. *Id.* at 717. (Fagg, J., dissenting from denial of rehearing en banc).

164. *Id.* at 719 (quoting *State v. Whiteside*, 272 N.W.2d 468, 470 (Iowa 1978)).

165. 106 S. Ct. 988 (1986).

166. *Id.* at 998.

167. *See supra* notes 81 & 83.

168. *Whiteside*, 106 S. Ct. at 999 (quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984)).

169. *Id.* at 997.

170. *Id.* at 996 n.6.

171. *Id.* at 1000 (Blackmun, J., concurring).

claim on the ground that sufficient prejudice was absent.<sup>172</sup> Therefore, a court should first examine prejudice suffered by the defendant and only if absolutely necessary examine counsel's performance for deficiencies.<sup>173</sup> Because the only federal issue in the case was whether counsel's conduct deprived Whiteside of effective assistance, it was inappropriate for the Court to determine whether Robinson's behavior conformed to one or another code of legal ethics. For Justice Blackmun, "[t]he signal merit of asking first whether a defendant has shown any adverse prejudicial effect before inquiring into his attorney's performance is that it avoids unnecessary federal interference in a State's regulation of its bar."<sup>174</sup> Clearly, Justice Blackmun would allow states to maintain their myriad approaches to a thorny ethical problem.

## V. PRACTICAL DEFICIENCIES OF THE FREE NARRATIVE

In addition to reflecting the damage done to the integrity of the judicial system through use of the free narrative, these cases illustrate other difficulties engendered by that approach. It has been suggested that observing Standard 4-7.7 may result in prejudicial error and in a quality of advocacy that, while not ineffective, is certainly compromised.<sup>175</sup> Even those scholars amenable to use of the narrative presuppose the honesty of the narrator. "[The] prime and essential virtue, then, [of narrative testimony] consists in *correctly reproducing and intelligibly expressing the actual and sincere recollection*."<sup>176</sup>

Generally, it is within the discretion of the court to determine the manner in which witnesses are interrogated.<sup>177</sup> A prosecutor could object to a defendant's offer of free narrative testimony on the ground that its use would allow no chance for prosecutorial objections to inadmissible evidence before it is heard by the factfinder. Should the judge sustain such an objection, the Stan-

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172. *Id.* at 1003 (quoting *Strickland*, 466 U.S. at 697).

173. *Id.* at 1006.

174. *Id.*

175. Comment, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545, 566-70 (1978).

176. 3 WIGMORE, EVIDENCE § 766 (Chadbourn rev. 1970) (emphasis in original).

177. See, e.g., FLA. STAT. § 90.612 (1985), which provides in part: "(1) The judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence, so as to: (a) Facilitate, through effective interrogation and presentation, the discovery of the truth." This statute is virtually identical to FED. R. EVID. 611(a).

dard offers no further guidance to defense counsel.<sup>178</sup> If the narrative is allowed and defendant must withstand cross-examination, the Standard implies that defense counsel may not engage in redirect. Further, the Standard is silent on the question whether defense counsel may object to a prosecutor's improper line of questioning.<sup>179</sup> Counsel may have relinquished the chance to rehabilitate his client's credibility even on subjects not related to the perjury.<sup>180</sup>

Additionally, the free narrative reveals more than it conceals. Because it is rarely used, it constitutes an abrupt change from defense counsel's usually active and aggressive examination of a defendant or witness.<sup>181</sup> A presiding judge with any degree of intelligence and experience will immediately be alerted that something is amiss. Regarding the futility of the device, one commentator has noted "that the trial judge will likely be made aware by the free narrative of the fact that the defense attorney believes that the client is lying on the stand was virtually conceded by the principal architect of the Standards."<sup>182</sup>

Further complications arise if the testimony is offered during a bench trial. Most jurisdictions permit a sentencing judge to take into consideration a belief that a defendant offered false testimony in his own behalf.<sup>183</sup> The defendant might thus be prejudiced at the sentencing phase if a judge is aware of defense counsel's belief that his client has committed perjury. An argument can be made, however, that any resulting prejudice is not unwarranted because a more burdensome sentence is appropriate for a defendant who has tried to gain acquittal through perjured testimony.<sup>184</sup> These problems are not avoided when trial is before a jury. While initially a jury might be unaware that it is hearing lies from the defendant, common sense suggests that the obvious conclusion eventually will be drawn, possibly when defense counsel makes a half-hearted or unconvincing closing argument without mentioning the client's tes-

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178. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 37 (1975).

179. Comment, *supra* note 175, at 566 n.174.

180. *Id.* at 567 n.175.

181. Wolfram, *supra* note 6, at 849-50. Usually, "[t]he testimony of a witness is elicited by the propounding of questions to him after he has been sworn and under the supervision of the judge. The questions must call for relevant and material testimony and must be free from vagueness, uncertainty, or ambiguity." 2 S. A. GARD, *FLORIDA EVIDENCE* Rule 21:02 (2d ed. 1980).

182. Wolfram, *supra* note 6, at 850 n.157.

183. *Id.*

184. *Id.* at 850.

timony.<sup>185</sup> It has been observed that a defendant is not well served by defense counsel who will "simply [allow] the client to jump off the perjury precipice with the unjustified hope of landing safely in the outstretched arms of a sympathetic jury."<sup>186</sup> A defendant who has the heart but not the mind for perjury may produce an utterly incoherent free-flow narrative and thereby alienate a jury.<sup>187</sup> Overall, it seems an illusory hope that a jury will remain sympathetic in the face of a free narrative.

Finally, the free narrative has an adverse effect on the quality—even the existence—of defense counsel's closing argument. Because the Standard precludes mention of the perjurious testimony, counsel's silence may well be interpreted as a confirmation of the client's guilt, especially if there is not much other evidence to develop. Defense counsel, if sufficiently demoralized, may waive closing argument or make only a perfunctory argument.<sup>188</sup> In *Herring v. New York*,<sup>189</sup> the Supreme Court recognized how important closing argument is for the defense in a criminal case. In it, the attorney distills and explains the issues and argues inferences that should be drawn from the testimony as a whole. "[F]or the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt."<sup>190</sup> Perjurious testimony obtained through the free narrative will only handicap defense counsel's honest efforts to muster a passionate argument in the client's behalf.

## VI. THE CANADIAN BAR APPROACH

A better approach was suggested by Professor Lefstein, tracking the recommendation of the Canadian Bar Association in its *Code of Professional Conduct*.<sup>191</sup> The rule is quite simple: as an advocate, counsel must treat the tribunal with respect and courtesy and represent the client resolutely, honorably, and lawfully.<sup>192</sup> How-

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185. Whether a jury is able to identify perjury may turn on a host of variables: How defense counsel has used peremptory challenges; whether the defendant's credibility was impeached; if any jurors have seen prior service; and whether the personal beliefs of the judge are apparent to the jury. *Id.* at 852.

186. Appel & McGrane, *Nix v. Whiteside: Client Perjury and the Criminal Justice System: The State's Position*, 23 AM. CRIM. L. REV. 19, 35 (1985).

187. *Id.*

188. Comment, *supra* note 175, at 567.

189. 422 U.S. 853 (1975).

190. *Id.* at 862.

191. Lefstein, *supra* note 6, at 688.

192. CANADIAN BAR ASS'N CODE OF PROFESSIONAL CONDUCT, ch. VIII (1974).

ever, "[a]dmissions made by the accused to his lawyer may impose strict limitations on the conduct of the defense, *and the accused should be made aware of this.*"<sup>193</sup> Professor Lefstein suggests that defense counsel make the following explanation to his client concerning the scope of the attorney-client privilege:

Anything you tell me is privileged. That is, I cannot reveal what you tell me to anyone, including the judge. However, I can reveal information about a crime you are planning to commit, including the crime of perjury. Thus, if you were planning to lie on the witness stand in your forthcoming trial, I could reveal this fact to the court. Now, of course, I am not assuming that you are planning to do this, but I did think that, in fairness, I ought to explain to you how the attorney-client privilege works.<sup>194</sup>

Attorneys and commentators who equate this admonition with a *Miranda* warning miss the point.<sup>195</sup> To mount an aggressive and effective defense, counsel must demand complete candor. Counsel must hear the entire truth and inform clients of potential consequences for deliberate falsehoods before a tribunal. Clients should recognize that there are limits to the attorney-client privilege.<sup>196</sup> Professor Lefstein indicates, however, that such a warning would not be construed as encouragement to the client to dissemble, conceal information, or lie. A client who is intent on committing perjury probably will not be diverted by counsel's admonition, and it is doubtful that a truthful client would be induced to be dishonest.<sup>197</sup>

Standard 4-7.7 limits the attorney-client privilege in ways that work to deceive rather than support the client. As the Arizona Court of Appeals noted in *State v. Lee*,<sup>198</sup> trial counsel doubted that he had advised appellant "that if the [perjured alibi] witnesses were called, counsel would be unable to give closing argument. Thus, any argument of waiver is negated by appellant's lack

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193. *Id.*, Commentary 9 (emphasis added).

194. Lefstein, *supra* note 6, at 688.

195. Monroe Freedman has been quoted as saying "'[i]t's very difficult to establish rapport' with indigent criminal defendants 'and you don't do it by walking in and giving a *Miranda* warning.'" Adler, *The Ethics of Perjury*, A.B.A. J., Nov. 1985, at 76, 80. Joseph L. Rauh, Jr., Freedman's own defense counsel during a 1966 bar investigation into Freedman's ethical positions, responded "I cannot accept the basic concept that a lawyer should try to deceive the court." *Id.*

196. Lefstein, *supra* note 6, at 688.

197. *Id.*

198. 689 P.2d 170 (Ariz. Ct. App. 1983), *vacated*, 689 P.2d 153 (Ariz. 1984).



of full warning as to the consequences of calling the witnesses."<sup>199</sup> Under the Standard, defense counsel is obliged to try to withdraw, and in meeting this obligation, by word or deed, will thus reveal the client's perjurious intent to the court. That the client may feel betrayed is understandable. If withdrawal is successful, substituted counsel may hear the same proposed testimony from a now sophisticated client who will perhaps be more adroit in concealing the falseness.<sup>200</sup>

The better approach is for defense counsel to demonstrate candor at the beginning of the attorney-client relationship. "The client who is adamant about presenting perjury will know the rules at the outset and, if he desires to be dishonest, his dishonesty presumably will be practiced on the first lawyer, thereby avoiding the difficulties incident to withdrawal."<sup>201</sup> If counsel becomes aware of any proposed perjury, his revelation to the court will come as no surprise to the client.

Use of the Canadian Bar approach in lieu of Standard 4-7.7 also might alleviate some of the public's mistrust of the legal profession. The free narrative seems to further the "tribal ethic" held by most attorneys of protecting oneself and one's group from threats from outsiders, in this case by suffering perjury in silence.<sup>202</sup> It is unlikely that attorneys would welcome a jury instruction detailing the scope of the free narrative, because "once forewarned, any juror with even minimal sense would then have to be quite suspicious about every *other* possible form of deception on the part of lawyers."<sup>203</sup> Therefore, attempts to conceal the client's misconduct and defense counsel's participation in the misconduct must give way to more candor and openness with the potentially perjurious client. Adoption of the Canadian Bar approach would be a reasonable first step.

## VII. CONCLUSION

*Sanborn v. State* represents the law in the Third District unless and until it is changed by a later en banc decision or by the Supreme Court of Florida.<sup>204</sup> The problem of the perjurious client is

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199. *Id.* at 173 n.3.

200. Lefstein, *supra* note 6, at 689-690.

201. *Id.* at 690.

202. S. Bok, *supra* note 56, at 148-49, 159.

203. *Id.* at 163 (emphasis in original).

204. *Rubin v. State*, 490 So. 2d 1001, 1004 n.3 (Fla. 3d DCA 1986), *cert. denied*, No. 69,048 (Fla. filed Dec. 19, 1986).

one that will not disappear. In light of the experience of other jurisdictions and the decision of the Supreme Court in *Nix v. Whiteside*, the next court to examine the issue should reassess and discard use of the free narrative in Florida's judicial system.

